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In the

Supreme Court of the United States

October Term, 1954

No. [redacted] 816

REX TRAILER COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	9
Appendix A—Opinion and Judgment Below	11–19

CITATIONS

Cases:

Coffey v. United States, 116 U. S. 436	7
Helvering v. Mitchell, 303 U. S. 391	7
United States v. Chouteau, 102 U. S. 603	6
United States v. LaFrance, 282 U. S. 568	7
United States v. Witherspoon, 211 F. (2d) 858 (C. A. 6)	5
United States ex rel. Marcus v. Hess, 317 U. S. 537	7
United States v. Weaver, 207 F. (2d) 796 (C. A. 5)	6

Constitution and Statutes:

Constitution of the United States:	
Fifth Amendment	6

INDEX—Continued

	Page
False Claims Act, 31 U. S. C., Sec. 231	7
Federal Property and Administrative Services Act of 1949, 63 Stat. 392, 40 U. S. C., Sec. 489	2
Surplus Property Act of 1944, 58 Stat. 756, as Amended, 60 Stat. 168, 50 U. S. C. App., Sec. 1611, *et seq.*:	
Sec. 26 (b) (1)	2, 3, 5, 6
Sec. 26 (c)	3
Sec. 26 (d)	3
18 U. S. C., 1940 ed., Sec. 80, 35 Stat. 1095	4
28 U. S. C., Sec. 1254 (1)	2
28 U. S. C., Sec. 2462	5

In the

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No.

REX TRAILER COMPANY, INC.,
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v.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Rex Trailer Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on January 18, 1955.

Citation to Opinion Below

The District Court did not render an opinion. The opinion of the Circuit Court of Appeals, printed in Ap-

pendix A hereto, *infra*, pp. 11-18, is reported at 218 F. (2d) 880.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 18, 1955. R., attached to clerk's certificate; Appendix A, p. 19, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented

Whether civil recovery by the United States from petitioner of the statutory sum of $2,000 for obtaining surplus property by fraud on each of the five counts of complaint based on Section 26(b)(1) of the Surplus Property Act of 1944 is barred by the prohibition against double jeopardy of the Fifth Amendment by reason of the prior criminal indictment against petitioner for the same offenses and its payment of the fines imposed, when on the admitted facts the United States suffered no pecuniary loss or damage.

Statute Involved

The statute involved is Section 26 of the Surplus Property Act of 1944 (58 Stat. 780, 50 U. S. C. App., Section 1635),[1] the pertinent portion of which provides:

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connec-

[1] Section 26 of the Surplus Property Act of 1944 was repealed and reenacted as Section 209 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 392, 40 U. S. C., Section 489).

tion with the disposition of property under this Act;

* * *

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

* * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

Statement of the Case

Respondent's civil complaint against petitioner in five separate counts was brought pursuant to the provisions of Section 26(b)(1) of the Surplus Property Act. Jurisdiction in the District Court was conferred by Section 26(c) of that Act. Count I of the complaint alleged that during the week of June 17, 1947, at Tinker Field, near Oklahoma City, Oklahoma, petitioner "did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration" for the purpose of obtaining a certain described motor truck (R. 2). Counts I through V of the complaint are identical with Count I except as to the name of the person making the false statement and the description of the motor trucks involved. Judgment was asked in the sum of $2,000 on each count, or a total of $10,000 (R. 2-3). No damage to respondent was alleged in the complaint.

Petitioner in its amended answer pleaded that the action was to recover a statutory penalty and not "for the collection of any obligation or indebtedness owing to or the recoupment or recovery of damage suffered by the (United States)" (R. 6), and that petitioner had previously been

indicted[2] in five counts with the identical offenses charged in the complaint, to which indictment it had pleaded *nolo contendere* and upon which a total fine of $25,000 was imposed on June 23, 1949, by the District Court of the United States for the Western District of Oklahoma and paid by petitioner (R. 6-7, 8-11).

Petitioner in its amended answer further alleged that the trucks in question "were advertised and offered for sale by the War Assets Administration at a fixed price and were sold first come first served to qualified purchasers;" that in the advertised offer for sale those granted priority of purchase were the "Housing Expediter and CPA Certificate Holders, Federal Agencies, Certified Veterans World War II, RFC for Small Business, States and Political Subdivisions and Certified Non-Profit Institutions" in that order of priority, and that if all available trucks were not purchased by those having priority, certain manufacturers and dealers of construction, mining and farm machinery were to have non-priority rights to purchase the trucks at the advertised price and that petitioner was such a dealer (R. 7). It was further alleged that the "false statements of a material fact in writing to the War Assets Administration" charged in the indictment were statements qualifying the persons named in each of the counts for a priority right to purchase, and that at the advertised sale all of the trucks were sold to those having or claiming priorities (R. 7).

In conclusion, it was alleged that respondent was not damaged and did not suffer any loss because of the sale of such trucks and received the full advertised offering price, and if the trucks had not been sold to the persons

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[2] The indictment was brought under 18 U. S. C., 1940 ed., Section 80, 35 Stat. 1095 (R. 8).

purchasing the same, they would have been sold at the same price to other priority or non-priority purchasers, and that the complaint seeks to recover a further penalty in addition to the fine and penalty adjudged and paid by petitioner, thereby placing it in double jeopardy contrary to the Fifth Amendment (R. 7-8).

Both parties moved for summary judgment on the pleadings, and the District Court granted respondent's motion and overruled that of petitioner (R. 12). Judgment was thereupon entered that respondent recover from petitioner the sum of $10,000 and costs (R. 13).

Reasons for Granting the Writ

1. The decision of the court below in this case holding that Section 26(b)(1) of the Surplus Property Act of 1944[3] is not penal in nature is in conflict with the decision of the Sixth Circuit Court of Appeals in *United States* v. *Witherspoon*, 211 F. (2d) 858. In that case it was necessary to determine whether Section 26(b)(1) was penal and subject to the five-year limitation provision of 28 U. S. C., Section 2462. The court in holding that provision for the payment to the United States of $2,000 for each fraudulent act in violation of the statute imposed a penalty stated at pp. 861-862:

> "The statute itself distinguishes between the sum of $2,000 required to be paid for each fraudulent act in violation of the statute, and the damages, which are also recoverable." * * *
>
> * * * * *
>
> "The exaction of the arbitrary sum of $2,000 for each offense of obtaining, by fraud, surplus property,

[3] The printed opinion below as certified in a number of instances mentions Section 26(a)(1), although it is clear that Section 26(b)(1), which is the statute involved, is the intended citation. This error is corrected in the reported opinion at 218 F. (2d) 880.

> without regard to its value, is a provision for a penalty. Its purpose is, obviously, to punish an offense against the public justice, in addition to double the amount of all damages suffered by the government."

The court in *Witherspoon* then noted that the decision of the Fifth Circuit Court of Appeals in *United States* v. *Weaver*, 207 F. (2d) 796, also involving a question of limitations, was to the contrary. Both *Witherspoon* and *Weaver* are referred to in the opinion below, and in footnote numbered 2 (Appendix A, *infra*, p. 16) the court states, "In our opinion the *Witherspoon* case was incorrectly decided." This conflict among the circuits as to whether the provision in Section 26 (b)(1) of the Surplus Property Act for payment of $2,000 to the United States for each fraud in addition to double damages is penal or remedial should be resolved by this Court.

2. The decision below in rejecting petitioner's plea of double jeopardy fails to give proper effect to the scope of the Fifth Amendment which guarantees that no person "shall be subject for the same offence to be twice put in jeopardy of life or limb." On the admitted facts, the proceeding herein is not for the collection of any obligation or indebtedness owing to respondent, or the recoupment or recovery of damage suffered, and respondent had sustained no financial loss or damage (R. 6, 8). In the absence of any damage to respondent, the instant action which seeks to recover the arbitrary statutory sum of $2,000 on each of five counts is in fact punitive and not remedial, and by reason of petitioner's previous indictment and payment of criminal fines imposed for the same offenses, the action although civil in form is barred by the double jeopardy clause. See *United States* v. *Chouteau*,

102 U. S. 603, 611; *Coffey* v. *United States*, 116 U. S. 436, 445; *United States* v. *LaFrance*, 282 U. S. 568, 574.

The decisions by this Court in *Helvering* v. *Mitchell*, 303 U. S. 391, and in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, relied upon by the court below, do not support the recovery of statutory civil sanctions granted the Government as against a plea of double jeopardy where the Government has suffered no financial loss. In the *Mitchell* case this Court upheld a 50% tax fraud penalty as a remedial sanction "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." (303 U. S. 391, 401.) The loss there was to the public revenue and the expense that of ferreting out the taxes fraudulently evaded. The *Mitchell* case is not authority that respondent may recover in this civil action the flat rate of $2,000 for each offense to reimburse the Government for expense incurred in the criminal proceedings.

United States ex rel. Marcus v. *Hess*, 317 U. S. 537, is discussed and quoted at length in the opinion below and needs little or no elaboration here. However, it is to be pointed out that the action in the *Hess* case, based on the False Claims Act (31 U. S. C., Section 231), was to recover damages for defrauding the Government through the use of fraudulent collusive bids. Such collusive bids by their very nature damaged the Government in its civil or proprietary capacity. The action there did no more than make the Government whole for actual loss. See concurring opinion of Mr. Justice Frankfurter, 317 U. S. 537, 553.

The Government in this case suffered no financial loss

on the admitted facts. The full offering price for the motor trucks was paid by priority purchasers or those claiming to have priorities. Even if it be assumed that the shortage of motor vehicles in 1946-47 is so well known that it may be judicially noticed, there is nothing in this record to support the assertion of the court below that the prices and conditions upon which the Government was willing to make the sales in question to veterans "was more favorable than in the market place." There is no evidence of a market price or that the offering price was less than the current market price.

Moreover, petitioner under the terms of the sale was among the class eligible to purchase the trucks on a non-priority basis at the offered price if not sold to priority holders (R. 7). And contrary to the statement in the opinion below, the Federal agencies had a higher priority than veterans and not a lower priority (R. 7); a priority which was not exercised, resulting in the trucks then becoming available for purchase by veterans. Since the Government agencies did not want the trucks, the Government was in no way financially injured when petitioner bought them at the offered price on a lower claimed priority.

The present action is solely to vindicate the Government in its sovereign capacity and not to recover compensation for loss or injury suffered. Petitioner's defense of double jeopardy should be sustained.

Conclusion

For the foregoing reasons, this petition for a writ of rtiorari should be granted.

Respectfully submitted,

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ENSLER, FAUVRE, DONGUS & CHAMBERS,
Of Counsel.

(Opinion Below).

In the

United States Court of Appeals

For the Seventh Circuit

No. 11139. OCTOBER TERM, 1954. JANUARY SESSION, 1955.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REX TRAILER COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

January 18, 1955.

Before DUFFY, *Chief Judge*, MAJOR and FINNEGAN, *Circuit Judges.*

DUFFY, *Chief Judge.* This action was brought by the United States government pursuant to § 26(b) of the Surplus Property Act.[1] The complaint contained five counts. Count 1 was as follows:

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[1] § 26(b)(1) of the Surplus Property Act of 1944, 50 U. S. C. A. appendix, § 1635(b), repealed and re-enacted as § 209(b) of the Federal Property and Administrative Services Act of 1949, 40 U. S. C. A. § 489(b).

"That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Company Straddle Truck, model 90-7056, serial 1940 USA 563821."

Counts 2 to 5 inclusive are identical with Count 1 except as to the name of the person making the false statement and the description of the motor vehicle involved. Judgment was asked in the sum of $2,000 on each count. Both plaintiff and defendant moved for summary judgment and plaintiff's motion was granted. The District Court entered judgment in favor of plaintiff for the sum of $10,000.

Sec. 26(b) of the Surplus Property Act of 1944 grants to the United States civil remedies against "Every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any government agency in connection with the disposition of property under this Act * * * (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or * * * "

As a defense the defendant alleged that it had pleaded *nolo contendere* in a criminal action based upon the same events; that in said criminal action the indictment contained five counts that corresponded exactly with the five counts in the instant action; that on June 23, 1949, as a

result of its plea, a fine was imposed and defendant has paid an aggregate sum of $25,000; that plaintiff was not damaged and did not suffer any loss as it received the full offering price for the vehicles; that although the complaint was denominated "complaint for civil damages" this action is, in fact, one to recover penalties, and, therefore, is barred by the prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution.

Defendant was a dealer engaged in buying, selling and repairing farm machinery and mining machinery. Under the advertisement and offer of sale, it had a non-priority right to purchase the motor vehicles thus offered for sale if any such remained after those having priority had been given an opportunity to purchase. The "false statements" charged were the statements qualifying the persons named in each of the counts for a priority right to purchase. At the sales in question all vehicles advertised were sold to those having or claiming priorities.

The Fifth Amendment guarantees that no person shall "* * * be subject for the same offense to be twice put in jeopardy of life or limb." However, "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attemptin g a second time to punish criminally; for the same offense." *Helvering* v. *Mitchell*, 303 U. S. 391, 399.

As stated in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 548, "The application of the double jeopardy clause to particular cases has not been an easy task for the courts." In the same case, the court, page 549, quotes from *Helvering* v. *Mitchell, supra*, as follows: "The question for decision is thus whether * * * (the statute in ques-

tion) * * * imposes a criminal sanction. That question is one of statutory construction." In other words, we must here endeavor to ascertain the legislative intent.

The section in question was enacted shortly after the decision of the Supreme Court in *Marcus* v. *Hess, supra.* We may assume that the framers of § 26(b) were aware of that decision when they formulated § 26(b). It should be noted that the statute specifically describes subsection (b) as providing "civil remedies." The section contains subsections 1, 2 and 3. The latter two provide only for multiple damages and are, without question, compensatory in nature. It is very doubtful that Congress intended to have the first of the three subsections a penal section. In fact, the pertinent committee report (S. Rep. No. 1057, 78th Cong., 2d Sess. p. 14) states that the United States has "* * * the option of selecting among three different measures of damages, * * *" It is a reasonable construction that Congress intended all three subparagraphs of § 26(b) to be *in pari materia.* It is also of significance that § 26(d) expressly provides that the "civil remedies provided in (§ 26) shall be in addition to all other criminal penalties and civil remedies provided by law."

If § 26(b)(1) is of a penal nature the imposition of such penalty in addition to the sanctions provided by the criminal code, contravenes the prohibition against double jeopardy. Of course, statutes are to be construed, if possible, to avoid constitutional issues. *United States* v. *Congress of Industrial Organizations, et al.*, 335 U. S. 106, 120-121; *Guessefeldt* v. *McGrath, etc.*, 342 U. S. 309, 319.

Both sides discuss and the Government strongly relies upon *Marcus* v. *Hess, supra.* There the defendant had pleaded *nolo* to an indictment to defraud the United States,

and had paid the fine which was imposed. Thereafter, an action was brought under the False Claims Act (31 U.S.C. 231) which contains language quite similar to § 26(b). It provides that a person who commits certain frauds upon the United States "* * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained * * * together with the costs of the suit; * * *" And, as here, the defendant sought to defend the civil action on the ground that the statute prescribed a penalty and that the double jeopardy provision of the Fifth Amendment barred the proceeding under the False Claims Act.

The court held that the provision that the Government was to recover $2,000 and double damages for each fraud in violation of the statutes was remedial and not penal. The court (317 U. S. 549) said: "It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction * * * We cannot say that the remedy now before us requiring payment of a lump sum (of $2000) and double damages will do more than afford the government complete indemnity for the injuries done it."

This construction by the Supreme Court of the statutory provision for the payment of $2000 plus double damages is, indeed, persuasive as to the construction to be given to § 26(b)(1). Both provisions relate to frauds upon the Government. The False Claims Act pertains to frauds in connection with claims submitted to the government. Sec. 26(a)(1) deals with frauds in procuring property from the government. Indeed, the language "forfeit and pay" in the False Claims Act is stronger than the language

"pay" in §26(a)(1). As the Supreme Court held that "forfeit and pay" did not convert the $2000 payment plus double damages provision in that Act to a penalty it seems to follow that it would also construe the milder provision of "pay" in §26(a)(1) in the same manner.

We think the decision of *Helvering* v. *Mitchell*, *supra*, also indicates that §26(a)(1) does not provide a penalty. In that case there had been a prosecution of defendant for fraud under the tax laws. Defendant sought to defend against the government's claim for an additional 50% over the tax owed, on the ground that its recovery was barred by the prohibition against double jeopardy. The court, pointing out that the basic question was one of statutory construction, held that Congress intended the 50% provision as a civil and not a criminal sanction.

The Court of Appeals for the Fifth Circuit, in *United States* v. *Weaver, et al.*, 207 F. (2d) 796, held that §26(a)(1) was compensatory and not penal. That case involved the statute of limitations but whether the section was penal or compensatory was of prime importance in making the decision. The court said, pages 797-798: "This is not a criminal prosecution; it is not a civil action for a penalty; it is a civil action to recover an award of damages of a compensatory nature, payable to the United States for injuries to its property rights."[2]

In *Marcus* v. *Hess*, *supra*, page 548, the court pointed out the difference between civil remedial actions brought

[2] The Court of Appeals for the Sixth Circuit in *United States* v. *Witherspoon*, 211 F. 2d 858, held that §26(a)(1) was penal. It is interesting to note that the opinion made no mention of *Helvering* v. *Mitchell*, *supra*, or *Marcus* v. *Hess*, *supra*, nor why these decisions which we regard as persuasive, were regarded by that court as inapplicable. In our judgment the *Witherspoon* case was incorrectly decided.

primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice, and that only the latter subject the defendant to "jeopardy" within the constitutional meaning. The defendant argues that the government here has not suffered a financial loss and hence the *Marcus* case cannot be considered as authority against its contentions. Defendant argues that the decision in the court below was on a motion for summary judgment and, therefore, we must consider as true, defendant's allegation that the United States suffered no actual financial loss because the priority purchasers actually paid the offering price. Defendant insists that if this action involves more than making the United States whole for actual financial loss, it involves punitive elements.

We may concede that if veterans and all others having priority did not purchase the motor vehicles advertised, that defendant or other persons having no priority might have purchased same. However, such assumption ignores realities. The shortage of civilian motor vehicles in 1946-7 was very acute and was well known. Motor vehicles made up a large portion of the surplus property set aside for the exclusive use of veterans. The objectives of the Surplus Property Act in 1944 were to facilitate and regulate the orderly disposal of surplus property while giving effect to 20 enumerated purposes, among which were (f) the giving of an opportunity to returning veterans to establish themselves in business, agriculture or professional life and (h) the discouragement of disposal of surplus property to speculators.

We think the government was damaged in several respects and in a manner difficult to assess in monetary

damages. The government wished to sell its surplus motor vehicles to certified veterans in order to assist in their re-assimilation into civil life, and it was natural that the prices and conditions under which the government was willing to make these sales to veterans was more favorable than in the market place where gray and black market conditions were not uncommon. Defendant's fraud caused the government to deal with a class to which it did not desire to sell its surplus motor vehicles. Further, by its conduct if there were any vehicles left after supplying the wants of service men, various agencies of the Federal Government had next priority. If the supply was exhausted by frauds such as perpetrated by the defendant there was no other place for Government Agencies to purchase needed vehicles except on the open market.

It is well settled that in addition to actual losses the government is entitled to reimbursement of costs in connection with ferreting out and investigation of the frauds. *Helvering* v. *Mitchell, supra*, p. 401; *Stockwell* v. *United States*, 13 Wall. 531, 547.

We hold that § 26(a)(1) is not penal in nature and that the judgment entered in favor of the government must be and is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeal for the Seventh Circuit.

APPENDIX A
(Judgment Below)

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

TUESDAY, JANUARY 18, 1955

Before

Hon. F. RYAN DUFFY, CHIEF JUDGE
Hon. J. EARL MAJOR, CIRCUIT JUDGE
Hon. PHILIP J. FINNEGAN, CIRCUIT JUDGE

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. REX TRAILER COMPANY, INC., *Defendant-Appellant.*	No. 11139 Appeal from the United States District Court for the SOUTHERN District of INDIANA INDIANAPOLIS Division

This cause came on to be heard on the transcript of the record from the United States District Court for the SOUTHERN DISTRICT of INDIANA, INDIANAPOLIS Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.